

DECISION RECORD

DIVISION:	Migration & Refugee Division
REPRESENTATIVE:	Mrs Pratibha Sharma (MARN: 0965020)
CASE NUMBER:	1914124
MEMBER:	Ann Duffield
DATE:	30 October 2023
PLACE OF DECISION:	Canberra
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa: • cl 820.211(2)(a) of Schedule 2 to the Regulations • cl 820.221(2)(a) of Schedule 2 to the Regulations • cl.820.221(2)(b) of Schedule 2 to the Regulations • cl.820.221(2)(c) of Schedule 2 to the Regulations • reg 2.03A •

Statement made on 30 October 2023 at 11:25am

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – sponsor now deceased – registered relationship – genuine and continuing relationship accepted – applicant’s close business, cultural or personal ties – limited but spontaneous and compelling evidence consistent with brief relationship before sponsor’s death – length of residence, work and continuing and supportive relationship with sponsor’s adult children – anonymous adverse allegation given no weight – decision under review remitted

LEGISLATION

Migration Act 1958 (Cth), ss 5CB(2), 65

Migration Regulations 1994 (Cth), rr 1.09A(3), 2.03A, Schedule 2, cls 820.211(2)(a), 820.221(2)

CASE

He v MIBP [2017] FCAFC 206

Any references appearing in square brackets indicate that information has been omitted from this decision pursuant to section 378 of the Migration Act 1958 and replaced with generic information.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 21 November 2017 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.221(2) because whilst the delegate was satisfied that the applicant was in a spousal relationship at the time of her sponsor's death, they were not satisfied that the applicant demonstrated that she had developed close business, cultural or personal ties in Australia (820.221(2)(c)).
4. The applicant appeared before the Tribunal on 27 October 2023 via Teams to give evidence and present arguments. The Tribunal also received oral evidence from the applicant's mother in the Philippines. The Tribunal hearing was conducted with the assistance of an interpreter in the Filipino and English languages.
5. The applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant meets the requirements of cl.820.221(2).
8. The Tribunal notes that the delegate made a finding that the applicant would have continued to be the de-facto partner of the sponsor had he not passed away, but that she had not developed close business, cultural or personal ties in Australia Cl. 820.221(2)(c). The Tribunal is not bound by that finding. The Tribunal has made its own assessment of the totality of the criteria.

9. BACKGROUND

10. The applicant is a citizen of the Philippines born on [Date]. She claimed no previous marriages or children in her partner visa application.
11. The parties claim to have first met online in February 2016 and then face to face on 25 February 2017 when [the sponsor] travelled to the Philippines [in] February 2017. He returned to Australia [in] March 2017.

12. S.376 Certificate and adverse information

13. On 31 May 2019, after the delegate made their decision on 17 May 2019, the department received an anonymous allegation that the applicant was married and had a husband and four children in the Philippines. The Tribunal provided the certificate to the applicant through her adviser and sought their comments on the validity of the certificate. They did not challenge the validity. The Tribunal put the information to the applicant during the scheduled hearing and she denied that she had ever been married and that her relationship with the sponsor was her first. The applicant's mother confirmed this with the Tribunal.
14. The Tribunal gives this anonymous allegation no weight.

Whether the parties are in a spouse or de facto relationship

15. Clause 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the de facto partner of the sponsor who is an Australian citizen. A copy of their registration certificate is on the tribunal file. The parties registered their relationship in New South Wales on 6 April 2018.

Are the parties in a de facto relationship?

16. 'De facto partner' is defined in 5CB of the Act, which provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s 5CB(2).
17. In forming an opinion whether they are in a de facto relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.09A(3) which is attached to this decision. Each of the specific matters contained in reg 1.09A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

18. Findings and reasons

19. The Tribunal found the applicant's evidence to be spontaneous and compelling. For the following reasons the Tribunal is satisfied that the applicant was the spouse of the sponsor at the time of decision and would have remained so had he not passed away.
20. The Tribunal has considered the financial aspects of the relationship – including joint ownership of assets; joint liabilities; extent of pooling of financial resources; any legal obligations owed to the other party; any sharing of day-to-day household expenses.
21. The Tribunal notes that the sponsor sent the applicant some cash when she was in the Philippines and that they opened a joint account at [Bank]. There is no evidence before the Tribunal that the bank account was utilised as a daily account or that the pay of the applicant or the sponsor was deposited there. The applicant has not provided the Tribunal any additional documentary evidence to suggest that they shared their financial resources, or indeed what those resources were.
22. The applicant told the Tribunal during the hearing that until she started working at [Employer] in January 2018, she did not have any money except what the sponsor provided to her. She said that the sponsor paid for everything and bought her whatever she needed. When questioned about this arrangement she told the Tribunal that she did not consider it unusual.

She had never worked or had any money of her own in the past and was grateful that the sponsor loved and supported her financially. When she began work in January 2018, he continued to support her financially although she paid for her personal items and sent money to her mother in the Philippines.

23. The Tribunal questioned the applicant about the sponsor's will and asked whether his wishes were complied with upon his passing. She stated that the sponsor put her in the will and left her a small amount. She was not able to say how much, nor did she have a copy of the will. In any case, she claims that she did not want anything and signed documents stating that she would not make any claim against it in the event of his passing. It transpired that the sponsor's children then sold the house in which she had lived with the sponsor and moved to other accommodation.
24. The Tribunal finds the financial aspects of the parties' relationship to be weak and without corroborating documentary evidence. However, the relationship was brief, and the oral evidence was not inconsistent with the circumstances of the applicant and the sponsor. The Tribunal therefore gives this aspect some positive weight.
25. The Tribunal has considered the nature of the household – including any joint responsibility for care and support of children; parties' living arrangements; and any sharing of housework.
26. The parties did not spend very much time together in the Philippines. The applicant travelled to Australia in May 2017 and she and the sponsor lived together until he passed away on 5 June 2018. Putting aside the year they spent communicating via social media, their time together was brief. The applicant said that she relied entirely on the sponsor for everything until she began working in around January 2018 for [Employer] and she still works for them full-time, a total of almost six years.
27. The applicant told the Tribunal that she and the sponsor travelled together to various places including Queensland. She said that she tended the garden and grew a variety of plants. She did the cooking and housekeeping, and they spent the days together doing everything.
28. The sponsor's adult children provided positive evidence about the relationship between the sponsor and the applicant and confirmed that they were living together.
29. The Tribunal finds little corroborative evidence to give a full picture of the nature of the parties' household. However, the relationship was brief, and the oral evidence was not inconsistent with the circumstances of the applicant and the sponsor. The Tribunal therefore gives this aspect some positive weight.
30. The Tribunal has considered the social aspects of the relationship – including whether parties represent themselves to other people as being in a de facto relationship with each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities.
31. The parties kept to themselves according to the applicant although they spent time with the sponsor's sister, and both of his children whom the applicant talked about fondly, stating they were always very supportive of her relationship with the sponsor and glad that she had made him happy.
32. The Tribunal finds little corroborative evidence of the parties' social activities. There are some photographs of them together and the Tribunal is satisfied that they presented as a couple to their respective families and were accepted as such. The evidence is consistent with the circumstances of the applicant and the sponsor. The Tribunal therefore gives this aspect some positive weight.

33. The Tribunal has considered the nature of persons' commitment to each other – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term.
34. The Tribunal asked the applicant when her relationship with the sponsor began, and she claimed it was in February 2016. She said that they had chatted together on a dating site and become close over that period. When he came to the Philippines to meet her, he also brought his son, [Mr A]. She told the Tribunal that [Mr A] had been wary of the relationship and wanted to ensure that she and the sponsor were genuine about each other and that she was not just seeking a visa outcome or his money. She herself was wary as it was her first relationship and she wanted to make sure that the sponsor's feelings and intentions were what she wanted. It is clear on the evidence that [Mr A] had given the relationship his blessing after meeting the applicant and assisted her and the sponsor to return to Australia.
35. The parties registered their relationship in NSW in April 2018. The Tribunal asked the applicant why she and the sponsor did not marry and put to her that perhaps it was because she was already married as suggested by the anonymous dob-in. The applicant strenuously denied this stating that she had never been married or had children and that her relationship with the sponsor was her first. She said that the sponsor wanted to marry her but reflected that it might cause some difficulties with his adult children. She explained that the sponsor had never married the mother of his children and he didn't want to risk upsetting them. She said that she accepted and understood his reasons.
36. After they registered their relationship in Sydney they travelled to Newcastle and spent two days with the sponsor's son, [Mr A]. They had a celebration at a [restaurant]. According to the applicant [Mr A] was happy that they had made the commitment.
37. The Tribunal spoke to the applicant's mother via telephone to the Philippines. The applicant's mother confirmed with the Tribunal that the applicant was living with her along with her husband, son and two grandchildren of the applicant's sister who was in [Country]. She confirmed that the applicant had never married and that the sponsor was her first relationship. The Tribunal accepts this evidence as truthful.
38. The applicant travelled to Australia in May 2017 with the expectation that she would return to the Philippines and apply for the partner visa offshore after three months. However, when it came time to return, they all decided to extend her tourist visa and apply for the visa onshore as she and the sponsor did not want to separate.
39. After the applicant passed away in June 2018, the applicant spent two weeks with the sponsor's daughter, [Ms B], in Newcastle. [Ms B] and [Mr A] organised the funeral and after the burial they all went to a restaurant. After the house was sold in August the applicant moved to [Location] where she remains to the present.
40. The evidence before the Tribunal indicates that the sponsor and the applicant did not rush into a transactional relationship which gave her a visa and the sponsor a companion. Both parties approached the relationship with caution until their feelings had developed to the point where they both were able to mutually commit to a spousal relationship. The Tribunal found the evidence compelling and the applicant a truthful and reliable witness.
41. The Tribunal is satisfied that the parties had a mutual commitment to a shared life together as spouses to the exclusion of all others and that they lived together.
42. On the basis of the above the Tribunal is satisfied that the requirements of s 5CB(2) are met at the time the visa application was made and at the time of this decision. The Tribunal is

satisfied that had the sponsor not passed away the relationship between them would have continued. Therefore, the applicant meets cl 820.211(2)(a) and cl.820.221(2)(b).

43. *Clause 820.221(2)(c).*

44. This clause requires that the applicant has developed close business, cultural or personal ties in Australia.
45. In assessing this requirement, the Tribunal is mindful that the applicant has been in Australia now for some 6 and a half years and working for the same company since January 2018. She maintains communication with the family of her sponsor and has developed close relationships with her co-workers and management of [Employer]
46. The Tribunal is satisfied that the applicant meets the requirements of cl.820.221(2)(c).

47. *Are the additional criteria for a de facto relationship met?*

48. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in reg 2.03A. Both members of the couple must be at least 18 years old: reg 2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
49. The applicant must have been in the de facto relationship for at least the 12-month period ending immediately before the date of the application: reg 2.03A(3). This requirement will not apply in limited circumstances, relevant to this case is where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009).
50. The applicant has provided evidence that the relationship is registered in New South Wales in April 2018 as a kind of relationship prescribed in the Acts Interpretation (Registered Relationships) Regulations 2008: reg 2.03A(5). Accordingly, the 12-month requirement does not apply.
51. For these reasons the Tribunal is satisfied that the applicant meets the additional criteria prescribed in reg 2.03A.
52. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

53. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner) visa:
- cl 820.211(2)(a) of Schedule 2 to the Regulations
 - cl 820.221(2)(a) of Schedule 2 to the Regulations
 - cl.820.221(2)(b) of Schedule 2 to the Regulations
 - cl.820.221(2)(c) of Schedule 2 to the Regulations
 - reg 2.03A

Ann Duffield
Senior Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits *the* regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).